Supreme Court, U.S.
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No. 87-267

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

D.H. HOLMES COMPANY, LTD.,
Appellant

v.

SHIRLEY MCNAMARA, SECRETARY OF REVENUE AND TAXATION, THE DEPARTMENT OF REVENUE AND TAXATION, STATE OF LOUISIANA,
Appellee

On Appeal from the Court of Appeal, Fourth Circuit, State of Louisiana

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REPLY BRIEF OF APPELLANT

ANDREW RINKER, JR.*
WILLIAM F. GRACE, JR.
KENNETH J. SERVAY
CHAFFE, MCCALL, PHILLIPS, TOLER & SARPY
2300 Energy Centre
1100 Poydras Street
New Orleans, LA 70163-2300
(504) 585-7000
Counsel for Appellant, D.H. Holmes Company, Limited

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Appellant, D.H. Holmes Company, Limited, disagrees with the statements of the question presented as stated by Appellee and the two amici curiae submitting briefs on behalf of appellee. Holmes submits that the question before the Court, properly stated, is as submitted in its jurisdictional statement, as further clarified in its original brief.

(ii)

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REPLY BRIEF OF APPELLANT

STATEMENT OF THE CASF

Holmes submits that the "Statement of the Case" in its original brief, pages 5-12, accurately sets forth the relevant facts as proven by the trial evidence and testimony.

While reserving its rights generally, Holmes specifically objects to one comment made in the "Statement of Case" submitted on behalf of appellee, Shirley McNamara, Secretary of Revenue and Taxation, the Depart-

ment of Revenue and Taxation, State of Louisiana (hereinafter "appellee," "Louisiana," or "State").

At page 5, appellee states, "They [the catalogs] could have been printed in Louisiana; however, Holmes sought to evade Louisiana sales tax by printing the catalogs elsewhere."

There is no evidence in the record supporting the State's contention that Holmes had the catalogs printed out of state to *evade* the Louisiana sales tax. The *uncontradicted* evidence, summarized at page 6 of Holmes' original brief, is: (1) Holmes contracted with New York catalog design professionals through a trade organization of which it was a member, because it received reduced design and printing costs by so contracting, (2) the catalog design professional, not Holmes, chose the out-of-state printers, and (3) under this arrangement, the printers mailed the catalogs from their respective locations in Oklahoma City, Boston and Atlanta. There is no evidence that Holmes had any intent to *evade* any taxes, or that Holmes, contracting under the trade organization package, could have chosen a Louisiana printer, as suggested by the State.

REBUTTAL ARGUMENT

The arguments of appellee and amici curiae on behalf of appellee are best addressed under three subheadings, parallelling the argument in Holmes' original brief: (A) What is the nature of the Louisiana taxing scheme at issue? (B) Given the nature of the taxing scheme, does the *Complete Auto*[1] test apply in adjudging the Commerce Clause constitutionality of the taxing scheme as applied? (C) If the *Complete Auto* test applies, is the Louisiana taxing scheme, as applied in this case, constitutional?

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[1] *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977).

A. What Is the Nature of the Louisiana Taxing Scheme?

Rather than address head-on the nature of its use tax scheme, *i.e.*, where, when and what it seeks to tax, and the importance of the nature of the tax scheme in evaluating its Commerce Clause constitutionality, the State *ignores* the question. Instead, it argues that the use tax was constitutionally assessed, because the Louisiana use tax scheme is "compensating" and is assessed against Holmes at the catalog recipient's mailbox at a time when Holmes, under State law, still *owned* the catalogs. The State argues that Holmes' "ownership" is supported by the fact that Holmes has a right to retrieve the catalogs after they are mailed. It submits that this Court should respect the state court's determination that the incidence of the tax was on the distribution of the catalogs (at the recipients' mailboxes), and that ownership was in Holmes at the time the tax was assessed. *See* Appellee's brief, 12-24.

Assuming that "ownership" is a relevant factor in determining against whom a tax may be assessed, it is irrelevant in determining the initial factor, *i.e.*, whether the item or transaction can be taxed at all.[2] Under this

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[2] The State also argues that Holmes, by changing its "Question Presented" as between its Jurisdictional Statement and its brief, waived its challenge to the constitutionality of La. Rev. Stat. 47:305(E), and further waived any right to disclaim "ownership" over the catalogs at the time the state assessed its tax. *See* Appellee's brief, 20-22. This argument is frivolous. While Holmes changed the language of its "Question Presented" in order to focus the issues, Holmes has waived no arguments thereby. The thrust of the Question Presented, both as stated in the Jurisdictional Statement and Appellant's Brief, is that the Louisiana use tax scheme, as applied to tax the catalogs in this case, is unconstitutional under the Commerce Clause. The change in language was designed to focus the main thrust of Holmes' argument upon the two principal provisions of the taxing scheme, La. Rev. Stat. §§ 47:302(A)(2) and 47:321(A), that provide for the assessment of the tax, and on the fact that these assessing provisions uncon-

Court's jurisprudence, the *nature* of the tax, *i.e.*, what is being taxed, and when and where it is being taxed, provides the key to determining whether any tax may be levied: *Goods* may not be taxed while they are in the course of interstate commerce. *See* cases cited in Holmes' original brief, 16-17. Neither the State nor amici curiae have cited any case decided by this Court upholding the constitutionality of a tax on goods still in the course of commerce, regardless by whom they were owned.

The nature of the Louisiana use tax scheme, as applied in this case, is one which imposes a tax on goods while they are still in the course of interstate commerce. Mr. Bradley, the Director of the Louisiana Department of Revenue Sales and Use Tax Section, indicated that the tax is assessed *on the catalogs* at the time they reach the recipients' mailbox or mailslot (J.A. 60-64). The Louisiana Court of Appeal, likewise, classified the tax as one *on property*, assessed at the time the catalogs reach the recipients' mailboxes:

> La. R.S. 47:302(A)(2) requires the levy of a tax *upon each article of tangible personal property* which is not sold, but brought into Louisiana. . . .
>
> * * *
>
> The use tax is levied *on all tangible personal property* imported from other states for use, consumption, distribution or storage in Louisiana just as if the articles have been sold at retail. . . .

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stitutionally assess a tax on goods while they are still in the course of interstate commerce.

Under this Court's Rules, particularly Rule 15.1 as referenced by Rule 34, the "Question Presented" is "deemed to comprise every subsidiary question fairly included therein." Clearly, other subsidiary provisions of the taxing scheme, such as La. Rev. Stat. § 47:305(E), as they relate to the imposition of the tax in this case, and the question of "ownership," insofar as it has any relevance at all, are within the scope of the question as presented in Appellant's Brief, and have not been waived.

McNamara v. D.H. Holmes Co., Ltd., 505 So.2d 102, 105 (emphasis added) (J.S.App. 7A). Likewise, the State argues before this Court that the tax is one on the catalogs themselves. *See, e.g.*, Appellee's brief, 12 ("Louisiana imposes a use tax on tangible personal property which a dealer, such as Holmes, imports or causes to be imported into Louisiana . . . ."), and is assessed when the catalogs reach the recipients' mailboxes. *See* Appellee's brief, 12-24. Indeed, the State's entire argument is based on the fact that Holmes *owned* the catalogs in Louisiana at the time the catalogs were taxed. *Id.* There clearly is no merit to the suggestion, raised by amici curiae, the National Governors' Association, *et al.*,[3] that the taxing scheme does not impose a tax on goods.[4]

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[3] Two amici curiae briefs were submitted on behalf of appellee, one collectively on behalf of the National Governors' Association, National Association of Counties, Counsel of State Governments, International City Management Association, National Conference of State Legislatures, National League of Cities, and U.S. Conference of Mayors (hereinafter collectively "the Governors' Association, *et al.*"), and another on behalf of the Multistate Tax Commission. Only the brief submitted by the National Governors' Association, *et al.*, addressed Holmes' challenge to the Commerce Clause constitutionality of the Louisiana taxing scheme. The brief submitted by the Multistate Tax Commission addressed only the due process arguments submitted by some amici curiae submitting briefs in support of appellant. Appellant Holmes in this reply brief, while reserving all arguments previously made by it and on its behalf, limits its rebuttal argument to the Commerce Clause issues presented in its Jurisdictional Statement and original brief.

[4] Even under Louisiana's own interpretation of its use tax scheme, many of the catalogs sent to Louisiana recipients may not be constitutionally taxed. Under the interpretation given the taxing scheme by Louisiana and the Louisiana Court of Appeal, imposition of the tax on Holmes depends on Holmes' "ownership" of the catalogs at the time they are placed in the recipients' mailboxes. What happens when the catalogs are not placed in a mailbox, but are picked up by the recipient directly from the mail carrier or from the Post Office? The answer, under the State's theory, is that these catalogs cannot be taxed, because the state-defined incident of taxation has been eliminated. The result is a confusing rule

Finally, the catalogs clearly were in interstate commerce at the time the state assessed its tax at the recipients' mailboxes. Neither the State nor any amici curiae arguing on behalf of the State in any way question the fact that the catalogs are in the course of interstate commerce while they are in the recipient's mailbox.

The use tax in question is a direct tax on *goods* imposed at a time while the goods still form part of interstate commerce. Holmes submits that the Louisiana use tax statutes, as applied in this case, violate the Commerce Clause, in accordance with this Court's long established rule prohibiting such direct taxation.

B. Given the Nature of the Louisiana Taxing Scheme, Does *Complete Auto* Apply?

The State and amici curiae, the National Governors' Association, *et al.*, submit that *Complete Auto* provides the proper test for determining the constitutionality of the Louisiana use tax scheme. While the State ignores this Court's well established jurisprudence prohibiting the taxation of goods while still part of interstate commerce, amici curiae dismiss this jurisprudence as "antique," and repudiated by *Complete Auto*. *See* brief of National Governors' Association, *et. al.*, 7-8. Amici curiae further suggest that *Complete Auto* applies, because the Louisiana tax impacts an "activity" and not "goods," but would nevertheless apply even if the Louisiana tax impacted "goods." *Id.* 8-10.

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where the constitutionality of the tax on each catalog depends on whether or not delivery occurred through a mailbox.

However, the Court need not address this problem, because goods do not exit the course of interstate commerce when they are placed in a mailbox. Goods form part of interstate commerce and may not be constitutionally taxed until the recipient receives them, whether by removing them from a mailbox, or taking them directly from the mail carrier. *See* Holmes' original brief, 13-15.

This Court's long-standing Commerce Clause rule against taxation of goods forming part of interstate commerce, while possibly "antique," certainly is not obsolete. As recently as *Kosydar v. National Cash Register, Co.*, 417 U.S. 62, 66-67 (1974), this Court noted the continued validity of the rule, set forth in *Coe v. Town of Errol*, 116 U.S. 517 (1886), that *goods* are immune from state and local taxation while in the course of commerce. Again in *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 302 (1976), a foreign commerce clause case, this Court noted the protection from state and local taxation afforded to goods while in the course of commerce. *See* Holmes' original brief, 16. The reason for such protection, to insure the free flow of goods between states, is as valid today as it was at the time the Commerce Clause was drafted. *See* Holmes' original brief, 16-17, *quoting from Wardair Canada, Inc. v. Florida Department of Revenue*, 477 U.S. 1, —, 91 L.Ed.2d 1, 9 (1986).

Consistent with this Court's jurisprudence, a long line of "modern" state appellate decisions have recognized the continued protection of goods from state and local taxation while the goods are in interstate commerce. *See* Holmes' original brief, 18-20.

Most importantly, neither the State nor amici curiae filing briefs in support of the State point to even one case where this Court has repudiated the long-standing Commerce Clause protection from taxation afforded to goods while they are still in the course of interstate commerce. Furthermore, neither the State nor amici curiae in support of the State cite to any cases decided by this Court applying the *Complete Auto* factors in adjudging the Commerce Clause constitutionality of a state or local tax directly on goods in the course of interstate commerce.

This Court's long-standing Commerce Clause rule prohibiting taxation of goods has not been repudiated. Louis-

iana violated this fundamental Commerce Clause prohibition in taxing Holmes on the catalogs while they still formed part of interstate commerce as part of the United States Mail. This Court need go no farther to hold the Louisiana tax, as applied in this case, in violation of the Commerce Clause.

C. If the *Complete Auto* Test Applies, Is the Louisiana Taxing Scheme, as Applied in This Case, Constitutional?

Louisiana and supporting amici curiae contend that the Commerce Clause constitutionality of Louisiana's use tax scheme should be adjudged under the *Complete Auto* test and that the Louisiana taxing scheme satisfies that test. The State argues that the first part of the *Complete Auto* test, requiring the *activity* sought to be taxed be sufficiently connected with the State to justify the tax, is satisfied by the number of stores, customers, and employees Holmes has in Louisiana. *See* Appellee's brief, 28-30. Amici curiae submit that this "nexus" requirement is satisfied, because Holmes directed the distribution of the catalogs to Louisiana residents through the United States Mail, and because Holmes used the catalogs in Louisiana to promote its business. *See* brief of National Governors' Association, *et al.*, 10-11. Finally, both Louisiana and amici curiae argue that the Louisiana Court of Appeal ruling should be sustained because, should Holmes prevail, interstate commerce will be advantaged at the expense of local business. *See* Appellee's brief, 25-27, 34-36; brief of National Governors' Association, *et al.*, 14-16.

Even assuming that the Louisiana use tax scheme imposes a tax on an *activity* and not on the *goods* themselves such that the *Complete Auto* test applies, the Louisiana taxing scheme violates the Commerce Clause.

First, the State's "nexus" argument, like the findings of the Louisiana Court of Appeal and the trial court,

improperly focuses on the relationship between the *taxpayer* and the taxing state, rather than on the relationship between the *activity* and the taxing state, as required by *Complete Auto* and its progeny. Louisiana points to *National Geographic Society v. California Board of Equalization*, 430 U.S. 551 (1977), and argues:

> Regarding the collection of use taxes the important relationship is not that between the state and the specific activity for which respondent is collecting taxes, but rather the relationship or nexus between the state and the taxpayer's overall activities within the taxing state which allows imposition of the duty to collect taxes.

Appellee's brief, 28. However, this is not a case like *National Geographic* involving a merchant's duty to *collect* and turn over to the state *taxes owed by others.* Here, Louisiana is attempting to assess *a direct tax* on property it claims Holmes: (1) purchased outside Louisiana, (2) imported into Louisiana, and (3) owned when the tax was assessed at the recipients' mailboxes. The *National Geographic* Court clearly stated that the tax *collection* fact situation presented in that case differed from a *direct tax* fact situation as presented here: Where at issue is the Commerce Clause constitutionality of a direct tax, the nexus required is between the *activity* sought to be taxed and the taxing state. *National Geographic*, 430 U.S. at 560 (quoted in Holmes' original brief, 22-23).

Likewise, the State's reliance on *Tyler Pipe Industries, Inc. v. Washington Department of Revenue*, 483 U.S. ——, 107 S.Ct. 2810, 97 L.Ed.2d 199 (1987), is inapposite. Unlike the present case, *Tyler* involved the question whether an out-of-state manufacturer who sold its products in Washington through an independent contractor had a sufficient "nexus" with the state to be subject to Washington's Business and Occupation Tax on wholesale sales. *Tyler* did not involve a challenge to the *activity*-state relationship involved in this case. *Tyler* makes no

pretext, as the State appears to suggest, of transforming the first part of the *Complete Auto* test from one measuring the connection between the taxed *activity* and the state to one measuring the connection between the *taxpayer* and the state.

While the impact of the Louisiana use tax scheme clearly is on *goods*, the State and amici curiae nevertheless argue that the tax should be sustained, because Holmes caused the catalogs to be imported into and distributed in Louisiana, and because the catalogs are related to Holmes' Louisiana business. *See* Appellee's brief, 29-30; brief of National Governors' Association, *et al.*, 10-12.

However, if the Louisiana tax is on the *activity* of distributing and importing (contrary to the State's own characterization and the finding of the Louisiana Court of Appeal—*see* pages 4-5, above), the Louisiana tax violates the Commerce Clause, because there is no evidence in the record that Holmes engaged in this *activity* in Louisiana providing a basis for the tax under *Complete Auto*: the catalogs were designed, printed, addressed and mailed from outside Louisiana. No one testified to any Louisiana *activity* performed by Holmes in "importing" the catalogs, or in "distributing" them to Louisiana recipients.

Nor did Holmes' *use* the catalogs in any use tax sense of the term. After the catalogs were addressed and mailed from outside Louisiana, Holmes lacked the possession or control over the catalogs necessary to make use of them. While the catalogs promoted Holmes' retail business, their *use* was by Holmes' customers to make purchases of goods. Importantly, Louisiana and its supporting amici curiae fail to note that Holmes collects and remits to the State the Louisiana sales tax on each item purchased via the recipients' Louisiana *use* of the catalogs in question. Thus, even if the Louisiana tax impacted an *activity* rather than *goods*, Holmes engaged in

no *Louisiana activity* with regard to the catalogs: the "distribution" activity occurred outside Louisiana.

If the Louisiana tax scheme truly impacts the *activity* of importing and distributing, the taxing scheme plainly violates the Commerce Clause by impacting on an *activity* occurring outside Louisiana. *See McLeod v. J.E. Dilworth Co.*, 322 U.S. 327, 330 (1944); *Evco v. Jones*, 409 U.S. 91, 93 (1972), and Holmes' original brief, 27.

Also, the suggestions of the State and its supporting amici curiae that Holmes is evading Louisiana taxes and that a ruling for Holmes places it in an advantageous position are without merit. As noted in Holmes' original brief, page 8, Holmes, in connection with its business operations in Louisiana, pays substantial Louisiana taxes, including sales, use, franchise, rental, and income taxes. Likewise, the suggestion that a ruling favorable to Holmes will discriminate against other in-state retailers and printers is meritless. Like Holmes, all retailers may decide where and how they may most economically print and distribute their advertisement materials; Holmes is afforded no option that is not also available to any other Louisiana retailer. Nor are Louisiana printers disadvantaged. Louisiana, like Oklahoma, Georgia, and Massachusetts, exempts from taxation the printing done in-state which is destined for first use out-of-state. *See* La. Rev. Stat. § 47:305(E).[5]

Finally, the fact that interstate commerce *may* be advantaged provides no basis for sustaining a tax where its clear impact is to burden unduly the free flow of commerce between the states. This Court has not hesitated to strike down taxes unduly burdening interstate commerce, even where the particular "interstate commerce"

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[5] La. Rev. Stat. § 47:305(E) provides in pertinent part:

> It is not the intention of this Chapter to levy a tax upon articles of tangible personal property . . . produced or manufactured in this state, for export.

in the case before it received an incidental benefit over a similar intrastate transaction. *See, e.g., Evco v. Jones*, 409 U.S. 91 (1972) (disallowing gross receipts tax on property sold in another state); *National Bellas Hess, Inc. v. Department of Revenue of the State of Illinois*, 386 U.S. 753 (1967) (striking down a holding requiring an out-of-state mail order retailer to collect Illinois "use" taxes from its Illinois customers). Indeed, any ruling in favor of a taxpayer necessarily will result in some advantage to the challenging taxpayer. The question is whether the tax scheme impermissibly burdens interstate commerce.

This Louisiana "mailbox" use tax unduly burdens interstate commerce. The Louisiana burden alone is substantial: the Louisiana use tax scheme, as interpreted by the State and the Louisiana Court of Appeal, subjects to the use tax at the recipients' mailboxes all catalogs, advertisement flyers, and indeed, all commercial correspondence, sent from outside Louisiana. In addition to the State's levy of sales and use taxes, Louisiana has sixty-four (64) "parishes" (*i.e.*, counties), each with the authority to levy its own sales/use tax, and in addition, has other jurisdictions, such as municipalities and school districts, with the authority to impose similar taxes. *See* La. Const. 1974, Art. 6, § 29(A).[6] "Economic Balkanization" is assured when one considers that forty-five (45)

[6] La. Const. 1974, Art. 6, § 29(A) provides:

> Section 29. *(A) Sales Tax Authorized.* Except as otherwise authorized in a home rule charter as provided for in Section 4 of this Article, the governing authority of any local governmental subdivision or school board may levy and collect a tax upon the sale at retail, the use, the lease or rental, the consumption, and the storage for use or consumption, of tangible personal property and on sales of services as defined by law, if approved by a majority of the electors voting thereon in an election held for that purpose. The rate thereof, when combined with the rate of all other sales and use taxes, exclusive of state sales and use taxes, levied and collected within any local governmental subdivision, shall not exceed three percent.

states, the District of Columbia, and innumerable local taxing jurisdictions have "use" taxes that can be similarly interpreted. *See* Holmes' original brief, 16-17, 31. Computers and modern technology do not eliminate the burden. Computers only keep track and analyze the data that humans input into their memory. With or without the use of computer technology, merchants will have the *human* burden of keeping track of innumerable, constantly changing tax statutes as applied (or not applied) to innumerable transactions.

The Louisiana use tax scheme, as applied in this case, plainly unduly burdens interstate commerce, whether or not *Complete Auto* provides the criteria for evaluating it.

CONCLUSION

Holmes submits that the Louisiana "mailbox" use tax statutory scheme, as interpreted to impose a "use tax" on the catalogs mailed in interstate commerce to Louisiana recipients, impermissibly burdens interstate commerce in violation of the Commerce Clause. This Court should strike down the Louisiana use tax scheme, as applied, and reverse the judgment and opinion of the Louisiana Court of Appeal, Fourth Circuit; the Court should hold the tax statutes and tax assessment thereunder, unconstitutional under the Commerce Clause.

Respectfully submitted,

ANDREW RINKER, JR.*
WILLIAM F. GRACE, JR.
KENNETH J. SERVAY
CHAFFE, MCCALL, PHILLIPS,
TOLER & SARPY
2300 Energy Centre
1100 Poydras Street
New Orleans, LA 70163-2300
(504) 585-7000
Counsel for Appellant,
D.H. Holmes Company, Limited

* Counsel of Record